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No. [redacted]56

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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UNITED STATES OF AMERICA, et al., *Petitioners,*

v.

WILSON & CO., INC., et al., *Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF FOR RESPONDENT TELEPHONE COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

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### JURISDICTION

The Petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

Whether the Court of Appeals, having suspended and thereafter affirmed an administrative order which prescribed both increases and decreases in rates for telephone and telegraph private line services, abused its equitable discretion, under the particular and nonrecurring facts of this case, by not providing restitution to users of telephone services for the period of the suspension.

## STATEMENT

### A. The Nature of the F.C.C. Order.

The order of the Federal Communications Commission which underlies this controversy prescribed a comprehensive readjustment of rates for private line services furnished by the American Telephone & Telegraph Company and Bell System Associated Companies (hereinafter referred to as the telephone companies) and The Western Union Telegraph Company. Numerous rates were affected, since the rates for private line services depend upon the length and characteristics of the circuit and the types of equipment used at the terminals.

The rates in effect prior to the F.C.C. order were set forth in tariffs on file with the F.C.C. and had been developed over the years on the basis of the various considerations normally reflected in the making of public utility rates. There was no claim that these pricing practices produced overall earnings that were unreasonably high, and it was the telephone companies' position that the rates for each of the private line services and the components within each service need not be directly correlated with costs.

The carriers, at the request of the F.C.C., prepared studies and introduced evidence in the Commission proceeding showing the costs of furnishing the various components of each of the private line services. The Commission, in its decision, prescribed new rates for each component of service based directly upon its cost. The Commission's cost basis of rate-making was not applied simply to the telephone rates as one broad category and the telegraph (teletypewriter) rates as another; the Commission's approach was to fix the rates for each component of each of the private line services as closely as possible to the costs associated with that segement of private line service.

This approach to rate-making resulted in a vast reshuffle of all private line rates. The existing rates were reduced in varying degrees for long-haul telephone and continuous telegraph circuits. The rates were increased in varying degrees for short-haul telephone and part-time telegraph circuits. All of these increased and decreased rates, and many others, were embraced in a single Commission order based on the single theory of making rates directly related to the cost of each component of service.

The Commission did not find that the private line rates of the telephone companies were, as a whole, unreasonably high. Indeed, the Commission's findings contemplated that the new rates would increase the telephone companies' revenues (R. 299)[1] In this context, the Government's repeated description of the existing telephone rates as "excessive" simply means that through application of the cost method of rate-making, many telephone rates, along with other private line rates, were reduced at the same time that many other rates were increased. The net effect of the Commission's order on telephone company revenues, considering all of the rate changes, was substantially offsetting.

Whether the net effect of the new rates on the revenues of the telephone companies was precisely offsetting, or produced a relatively small increase or decrease in revenues, depends upon the volume and proportion of the use of the various categories of private line services at any particular time. The Commission's findings contemplated that the net effect of the Commission's order would be to increase the telephone companies' revenues by $2,156,000 per year (R. 299), an increase of about 2.5 percent of the total private line revenues (R. 307, 308). By 1963, the volume and proportions of usage of the various private line services were

[1] As in the Petition for Certiorari, "R. . . ." refers to the Appendix filed in the Court of Appeals by the meat packers.

such that the effect of the new rates on telephone company revenues was substantially offsetting.[2] Estimates based on billing rates for each customer for September 1964 and October 1964 (multiplied by the 14 month period that the rates were suspended) indicate that the new rates would have had the net effect of reducing telephone company revenues by $1,637,000 (a reduction of 0.8 percent of the private line revenues covered by the F.C.C. order).[3]

**B. The Proceedings in the Court of Appeals.**

Three meat packers, users of private line services subject to rates increased by the Commission's order, filed a Joint Petition for Review in the Court of Appeals. The grounds of this Petition for Review challenged, *inter alia,* the cost theory that formed the basis for the prescription of all new private line rates (R. 329-338). As the meat packers stated

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[2] Affidavit of Francis J. Woods, attached to telephone companies' Answer to Application for Interlocutory Injunction dated July 29, 1963.

[3] At page 11 of the Petition, the Government states: "AT&T argues that restitution of some $7,000,000 which would be due certain of its customers should not be decreed because AT&T was deprived by the injunction of over $5,250,000 in higher rates prescribed by the Commission." The "$7,000,000" figure represents the estimate of reductions in rates for telephone users whose rates were reduced (rounded from $7,291,000). The "$5,250,000" figure does not represent all of the "higher rates prescribed by the Commission," but does approximate the estimate for telegraph users whose rates would be increased ($5,673,000). For all private line customers whose rates were increased by the Commission the estimate is $7,560,000 and for all customers whose rates would be reduced the estimate is $9,197,000, indicating a net reduction of $1,637,000. The figures shown for the September 1964-October 1964 analysis treat customers using both telephone and telegraph services as separate customers. No claim is made that the September-October billing data are representative of the entire period.

below, the grounds of their Petition for Review "challenge the validity of the F.C.C. orders in their entirety."[4]

The meat packers moved that the private line telegraph rates be suspended pending judicial review "with respect to petitioners."[5] The telephone companies filed an answer asking that interlocutory relief be denied so that all the new rates would become effective at once; the telephone companies also answered that it would be inequitable to stay the operation of the Commission's order as to petitioners, whose rates would be increased, without staying the entire order before the court.[6] The Court of Appeals entered a temporary stay, and thereafter entered an interlocutory injunction, suspending the Commission's orders in their entirety. At every stage of the litigation preceding the entry of the interlocutory injunction, the Government insisted that reduced rates be imposed upon the telephone companies even though increased rates prescribed in the same order on the same theory of rate-making were suspended.[7]

After denial of a petition for rehearing directed to the interlocutory injunction, the United States and the Commission petitioned for a writ of certiorari (No. 711, 1963 Term), claiming that the Court of Appeals should have attached to its interlocutory injunction requirements that, if the Commission's order were affirmed, the telephone companies make refunds to telephone customers whose rates were reduced

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[4] Reply to Motion for Modification of Temporary Stay, August 12, 1963, p. 2. The "orders" referred to are the single order prescribing the new private line rates pursuant to the Commission's Final Decision (R. 304-305), and the same order, amended as to the effective date, entered by the Commission after consideration of petitions for reconsideration (R. 322-323).

[5] Application for Interlocutory Injunction, p. 4.

[6] Answer dated July 29, 1963.

[7] See Government Motion dated August 2, 1963, Motion dated August 16, 1963, and Supplemental Brief dated September 23, 1963.

and that billing records be preserved during the period the rates were suspended. Our Brief in Opposition urged that it would be inequitable to burden the telephone companies with reductions in rates while depriving them of increased rates prescribed in the same order. We also urged that the issue of restitution was premature and that the billing records were being preserved in any event. With the assurance as to preservation of records, the Solicitor General withdrew his support of the Petition. The Commission's Petition was denied. 376 U.S. 944.

On August 14, 1964, the Court of Appeals issued its opinion affirming the Commission's orders. The Government thereupon submitted a proposed decree which included a provision that the court retain jurisdiction to consider an award of restitution. After the filing of objections to the proposed decree,[8] the Court of Appeals entered its final decree on September 17, 1964, in which it affirmed the Commission's order, dissolved the suspension of the new rates effective October 1, 1964, and made no provision for restitution or for retaining jurisdiction.[9]

## REASONS FOR DENYING THE WRIT

The Government's Petition does not present any basic question of law, but only the question of whether, on the particular facts of this case, the Court of Appeals has abused its equitable discretion by not providing restitution.

There is no question as to the statutory authority of the Court of Appeals to suspend the Commission's order pend-

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[8] See Objections of Western Union dated September 2, 1964, and Suggestions of meat packers dated September 3, 1964. See also Comments of telephone companies dated September 3, 1964, and the Government's Memorandum dated September 9, 1964.

[9] The meat packers' petition for certiorari directed to the affirmance of the Commission's order has been filed as No. 765, this Term.

ing judicial review. Last Term, the Government expressly disclaimed any contention that the Court of Appeals had abused its discretion in suspending the entire order, including the telephone rates (Petition in No. 711, Oct. Term 1964, p. 16).[10]

Nor is there any difference between the parties with respect to the law applicable for the period during which the rates were suspended. The tariffs containing the newly prescribed rates were not effective during the period of suspension, but the telephone companies have never questioned the Court of Appeals' jurisdiction to award restitution in a case in which the equities call for the exercise of such jurisdiction.

The Government asserts that the question presented in this case is whether the court below "had a duty in equity" to require the carrier to make refunds to telephone customers whose rates were reduced (Petition, p. 2). The question actually presented is the broader one of whether equity was done, having regard to all the circumstances of the case. The equities to be considered include those of car-

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[10] The Government's inconsistent suggestion that AT&T "was hardly entitled to enlarge the scope of the review proceeding" (Petition, p. 13) is entirely beside the point. The Petition for Review defined the scope of the proceeding and rested on grounds that challenged the F.C.C. order in its entirety (Statement, pp. 4-5, *supra*). The sole concern of the telephone companies was equitable treatment during judicial review of a single order of the Commission prescribing both increases and decreases in rates.

The Government's belated suggestion that AT&T should have filed a "conditional petition for review" (Petition, pp. 12-13) is also beside the point. It would be unsound and inequitable to require carriers to burden the Court of Appeals with additional Petitions for Review of orders that the carriers are willing to place in effect, simply to obtain equitable treatment for the period during which rates are suspended at the instance of users and over the objection of the carriers.

riers as well as rate-payers. *Iyland Steel Co.* v. *United* States, 306 U.S. 153. And while equity may call for restitution under one set of facts, equity may, under other facts, require the court to "stay its hand and leave the parties where it finds them." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 314. The Government gives no recognition to the principle that "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it . . ." *Id.*, 295 U.S. at 310.

The circumstances of the instant case, as we shall show, are such that the Court of Appeals did not abuse its discretion by leaving the parties where it found them.

**1. The Court of Appeals Did Not Abuse Its Equitable Discretion.**

The refusal of the Court of Appeals to provide for restitution was equitable in light of the nature of the Commission's order prescribing numerous increases and decreases in rates for the various categories of private line services. Whether or not the increases or decreases in rates are precisely offsetting at any given time,[11] the treatment which the Government asks this Court to impose would be manifestly inequitable. The following table illustrates the equities of the situation in a simplified but realistic way:

| Customer | Old Rate | New Rate | Change |
|---|---|---|---|
| A (long telephone circuit) | $100 | $ 93 | $ -7 |
| B (short telephone circuit) | 30 | 32 | +2 |
| C (continuous long telegraph circuit) | 50 | 47 | -3 |
| D (8-hour short telegraph circuit) | 20 | 28 | +8 |
| | $200 | $200 | 0 |

[11] See Statement, pp. 3-4, *supra*.

Where all the new rates were suspended pending judicial review and thereafter upheld, the Government contends that the court must order the carrier to refund the reduced telephone rates (Customer A would be paid $7). The Government would thus take a situation in which a rate order has no effect, or relatively little effect, upon the revenues of a carrier, and convert that situation to the injury of the carrier. The Government would impose this result where the Court of Appeals decided, over the opposition of the carrier, to suspend the rates pending judicial review upon the application of customers whose rates would be increased.[12]

The Government suggests that the Court of Appeals might consider offsetting the increases and decreases in telephone rates "in computing the windfall to AT&T from the stay of telephone rates" (Petition, pp. 11-12, note 7).[13] But the Government would not permit the carrier to offset the increases in telegraph rates (Customer D) in computing "the windfall." Nor does the Government propose any payment to the telegraph (teletypewriter) user whose rates were decreased (Customer C would get nothing). The concept underlying the Government's position is that an arbitrary iron curtain should be dropped across the Commission's order, dividing the changes in rates for telephone services from those for telegraph services in defiance of the integral nature of the Commission's rate prescription. The Government proposes a kind of selective "equity" that

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[12] Because only three of several thousand private line users are parties to the action in the Court of Appeals, restitution for the benefit of the carrier is not available with respect to the rates which were increased.

[13] In terms of the above example, the increase in telephone rates that Customer B would have paid but for the stay ($2) would be offset against the refund to Customer A ($7), for a net payment of $5 to Customer A.

would single out certain customers for favored treatment, ignore others, and inflict unjust injury upon the carrier.

There is no basis in the order of the Commission for such an arbitrary demarcation. As shown in the Statement (pp. 2-3, *supra*), the F.C.C. issued a single order, based on a single theory of rate-making, which changed the rates for many separate categories of private line services, whether telephone or telegraph. During the proceedings before the F.C.C., the Commission itself condemned as unrealistic any separation of the investigation of rates for telephone and telegraph services. In its Order dated January 29, 1959, denying a petition of telegraph users for a separate record, the Commission stated (R. 427, 430):

> "[The] determination of just and reasonable rates applicable to AT&T's private line telephone services [involves] cost and rate structure considerations which, in large measure, *are inseparable* from considerations pertinent to the determination of teletypewriter [telegraph] rates. We do not see how it would be realistic or conducive to an expeditious determination of the issues herein to attempt to fragmentize the proceeding in these respects even if it were possible to do so." (Emphasis supplied.)

Although the Government's entire position depends upon the separability of the F.C.C. order as between telephone and telegraph services, the Petition does not attempt to cope with the conclusion of the F.C.C. itself not to "fragmentize" the proceeding because the considerations affecting the rate structure for both telephone and telegraph services "are inseparable."

When the Commission's order is treated as the single order it is, the bottom drops out of the Government's position. The whole purpose of the restitution remedy which the Government seeks to invoke is to prevent "unjust enrichment." *Stone* v. *White*, 301 U.S. 532, 534; ALI, Restate-

ment, Restitution, § 1.[14] The carrier is not unjustly enriched by the suspension of an order which prescribes substantially offsetting increases and decreases in rates.[15] Such consideration of offsetting transactions goes to the heart of the doctrine of restitution.[16]

The equitable doctrine of restitution thus requires that telephone rate increases be offset against telephone rate reductions (as the Government itself suggests, Petition, pp. 11-12, note 7), and, for the same reason, equity requires that all rate increases under the F.C.C. order be offset against all rate reductions. This is the substantial effect of the Court of Appeals' refusal to provide restitution in this case.

Not one of the cases cited in the Petition (p. 10) supports the Government's position that the telephone companies should pay restitution for rate decreases without regard to rate increases. Nor do any of the cases cited hold that a carrier may be required to pay back revenues in excess of those which it actually received. Indeed, the quotation from *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 786 (Petition, pp. 10-11), is taken out of context for, immediately preceding the quotation in the Petition, the Court emphasized that "All payments made by appellants in compliance with the invalid order inured to the benefit of

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[14] "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309.

[15] This is particularly true where, as in this case, the Commission's findings indicated that the revenues of the carrier would be *increased* by over $2 million per year (see Statement, p. 3, *supra*).

[16] *Stone* v. *White*, 301 U.S. 532, 534-535, 537. See also cases cited in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309, 310, holding that losses may be offset against gains, even in the extreme case where the reason for restitution is fraud.

[appellees]" (279 U.S. at 786). Here, the Government is asking that restitution be decreed whether or not the carrier received any benefit at all under the administrative order in question.[17]

The Court of Appeals, upon completion of the judicial review proceeding, and with its familiarity of the offsetting effect of the rates prescribed in the inseparable order under review, was specially fitted to pass upon the equities of this particular case. The Court of Appeals did not abuse its discretion by leaving the parties where it found them. The Court of Appeals left the parties in exactly the same position during the period of judicial review in which the Commission itself left them during the period for which it postponed the effective date of its entire order pending its consideration of petitions for reconsideration (R. 471).

**2. No Question of General or Future Importance Is Presented.**

The Government's assertion that the action of the court below "has wide significance as a precedent and is of general concern from the standpoint of effective rate regulation" (Petition, p. 9) is not correct.

This case involves only the exercise of equitable discretion with respect to the special circumstances of the F.C.C. order under review in the court below. The Government's primary objection to the judgment below stems from its artificial and unrealistic concept of the separability of this F.C.C. order as between telephone and telegraph private

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[17] The Government would have this Court put aside equitable considerations and, in the guise of restitution, impose liability for damages contrary to the settled law that the issuance of an injunction cannot be the basis of an action for damages. See *Greenwood County* v. *Duke Power Co.*, 107 F.2d 484, 487-488 (C.A. 4), *cert. den.*, 309 U.S. 667, and cases cited therein.

line rates (pp. 9-10, *supra*). The determination of the separability of this particular administrative order hardly rises to the status of a decision having "wide significance as a precedent."

The decision below cannot possibly cause any concern for the future of "effective rate regulation" because the question decided should never arise again. The question arose in this case only because the Government repeatedly sought to impose upon the telephone companies an obligation to refund reduced rates where the carriers could not collect the increased rates prescribed by the same order. This situation should not recur because the Solicitor General has now stated, on behalf of the Government and the Commission, that the proper approach would be to stay reductions in rates, including the telephone rates, and permit the carriers to collect increases in rates, subject to refund consistent with the Court's final determination (Petition, p. 13). If the Government had not persisted in its position in the court below, inconsistent with the equitable approach which the Solicitor General now calls "commonplace," the question now before the Court would never have arisen.[18]

Because the Government now advocates an equitable solution of the problem that would be raised in any future judicial review of a similar F.C.C. order, the question decided below has no future significance. This Court has

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[18] The Government blames AT&T for not suggesting this approach at the time the interlocutory injunction was sought and granted (Petition, p. 13, note 9). This is a wholly unrealistic suggestion in view of the Government's stubborn insistence that the telephone rates were separable and could not in any event be suspended without a condition requiring refund (see Statement, p. 5, *supra*). The Government did not depart from that erroneous and inequitable position until after the issuance of the interlocutory injunction and, when such a proposal was belatedly made, the telephone companies concurred in it. The meat packers vigorously opposed the proposal, and the Court of Appeals rejected the Government's motion. (See Government's Motion for Leave to File Additional Pleadings, Petitioners' Opposition, and the Order of the Court of Appeals, dated October 30, 1963.)

made it plain that the "special and important reasons" required for the granting of a writ of certiorari (Rule 19) "imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74. See also *District of Columbia* v. *Sweeney*, 310 U.S. 631; *English* v. *Cunningham*, 361 U.S. 905, 907. Under the Rules and decisions of this Court, there is no basis for granting a writ of certiorari to review the "episodic" exercise of equitable discretion by the court below in dealing with a situation that should never arise again.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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